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California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

SAMUEL DAVID SAYLES,

Defendant and Appellant.

D073107

(Super. Ct. No. SCD262972)

ORDER MODIFYING OPINION
AND DENYING REHEARING

CHANGE IN JUDGMENT

THE COURT:

It is ordered that the opinion filed herein on April 9, 2019, be modified as follows:

On page 1, the sentence "Affirmed as modified," is deleted and the following sentence is inserted in its place:

Affirmed in part, reversed in part, and remanded for resentencing.

On page 2, the sentence beginning, "Because the evidence presented," is deleted and the following sentence is inserted in its place:

Because the evidence presented at trial fails to establish the Skyline Piru Blood gang is a criminal street gang within the meaning of section 186.22, subdivision (f), we strike the three-year sentence

enhancement imposed under section 186.22, subdivision (b)(1) and remand for resentencing.

On page 2, the sentence beginning, "We direct the judgment," is deleted and the following sentence is inserted in its place:

In all other respects, we affirm the judgment.

On page 10, the sentence beginning, "The Attorney General concedes," is deleted and the following sentence is inserted in its place:

The Attorney General concedes there is no evidence the Skyline Piru Blood gang engaged in any primary criminal activity, which was required to find the Skyline Piru Bloods to be a " 'criminal street gang,' " and agrees the enhancement accordingly should be reversed.

On page 10, the sentence beginning, "We accept these concessions," is deleted and the following sentence is inserted in its place:

We accept these concessions, remand for resentencing, and affirm the judgment in all other respects.

On page 13, the sentence beginning "We therefore," is deleted and the following sentence, including new footnote 7, is inserted in its place:

We therefore reverse the jury's true finding on the gang enhancement under section 186.22, subdivision (b)(1) alleged in connection with count 1 and remand for resentencing.⁷

⁷ Both parties requested that we reverse the gang enhancement based on the insufficiency of the evidence. Neither party requested that we remand for resentencing in their opening and responding appellate briefs. However, it appears Sayles may be entitled to serve his sentence in county jail rather than state prison as a result of our reversal of the gang enhancement. (See § 1170, subd. (h)(2); see also § 1170, subd. (h)(7) ["The sentencing changes made by the act that added this subdivision shall be applied prospectively to any person sentenced on or after October 1, 2011."].) We therefore remand for resentencing to allow the trial court to address this issue.

On page 14 continuing to page 15, the paragraph after the heading "Disposition" is deleted and the following paragraph is inserted in its place:

The judgment is modified to reverse the gang enhancement imposed under Penal Code section 186.22, subdivision (b)(1) and strike the \$2,400 parole revocation fine imposed under Penal Code section 1202.45. In all other respects, the judgment is affirmed. The matter is remanded for resentencing without the gang enhancement. Upon resentencing, the trial court is directed to prepare an amended abstract of judgment and forward a copy of that amended abstract to the appropriate authorities.

This modification changes the judgment. (Cal. Rules of Court, rule 8.264(c)(2).)

In all other respects the opinion remains the same.

Appellant's petition for rehearing is denied.

McCONNELL, P. J.

Copies to: All parties

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D073107

(Super. Ct. No. SCD262972)

APPEAL from a judgment of the Superior Court of San Diego County, Eugenia A. Eyherabide, Judge. Affirmed as modified.

Heather L. Beugen, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina and Quisteen S. Shum, Deputy Attorneys General for Plaintiff and Respondent.

In 2017, a jury convicted Samuel David Sayles of involuntary manslaughter in connection with the 1995 killing of Crystal Odom. (Pen. Code, § 192, subd. (b).)¹ The jury found true the allegation that Sayles committed the offense for the benefit of, at the direction of, or in association with a criminal street gang. (§ 186.22, subd. (b)(1).) The trial court sentenced Sayles to eight years in state prison. The trial court also imposed a parole revocation restitution fine under section 1202.45.

On appeal, Sayles challenges the gang enhancement, contending there is insufficient evidence to support its application because there was no evidence the Skyline Piru Blood gang engaged in one or more of the statutorily enumerated offenses as one of its primary activities. The Attorney General concedes the evidence is insufficient in this respect and we agree. Because the evidence presented at trial fails to establish the Skyline Piru Blood gang is a criminal street gang within the meaning of section 186.22, subdivision (f), we must strike the three-year sentence enhancement imposed under section 186.22, subdivision (b)(1). We further conclude the parole revocation restitution fine imposed under section 1202.45 is unauthorized and must be stricken. We direct the judgment to be modified accordingly, and we affirm the judgment as modified.

BACKGROUND

In 2016, Sayles and codefendant Aswad Walker were charged for the 1995 murder of Crystal (count 1) and attempted murder of Curtis H. (count 2). (§§ 187, subd. (a), 664.) The information alleged the crimes were committed for the benefit of, at the

¹ All statutory references are to the Penal Code.

direction of, or in association with a criminal street gang within the meaning of section 186, subdivisions (b)(1) and (2). The information further alleged that, although he was not personally armed with a firearm during the commission of the offenses, Sayles was a principal in the commission of the offenses and was vicariously liable for a principal being armed with a firearm in the commission of the crime within the meaning of section 12022, subdivision (a)(1). Sayles and Walker were tried jointly with separate juries.

A. Trial Evidence

On the night of April 29, 1995, Crystal drove her boyfriend Curtis's car to the gas station a few blocks from her mother's house. Curtis, 19 years old at the time, was sitting in the front passenger seat and their 10-month-old daughter was in the back seat.

At the gas station, Curtis noticed a car filled with people. Curtis testified the people in the car looked at him in an unfriendly manner, "like a[n] evil stare or something, a mean look or stare." He recognized Walker as one of the passengers. Curtis had fought with Walker years before, when they were in middle school, and since then "bad blood" and "gang banging" continued between them. Curtis associated mostly with Crips and the color blue, while Walker associated with Bloods and the color red.

Curtis testified the Skyline Piru gang was a Blood gang that claimed southeast San Diego as its territory—an area located a couple of blocks up the hill from the gas station. Crips territory was a few miles away on the other side of town.

J.P. was with his friends Walker and Sayles that night.² They were in Sayles's car, a Saab. Sayles was driving; Walker sat in the front passenger seat; J.P. sat in the back seat behind Walker.³ J.P., Walker, and Sayles "claimed" Skyline, which meant they grew up and "hung out" with the people in the Skyline neighborhood. J.P. testified he "guess[ed] [he] would be labeled a . . . member [of the Skyline Piru Gang]."

J.P. testified he, Walker, and Sayles saw Curtis's car at the gas station. J.P. recalled that Walker and Curtis had previously fought. Occupants in the two cars exchanged "hard looks." No words or hand gestures were exchanged.

Curtis was going to exit the car to get gas, but Crystal told him not to and to stay in the car. They decided to leave. Crystal was still driving.

When Curtis's car left, J.P., Sayles, and Walker followed it. Curtis testified that Crystal began to speed up, but he told her to slow down; he did not think anything serious was going to happen and their daughter was in the back seat. Sayles's car flashed its headlights off and on as it followed Crystal and Curtis, one to two car lengths behind. Crystal and Curtis came to a stop at a stop sign. J.P. testified that, as Curtis's car turned right, Sayles's car continued straight, passing Crystal and Curtis on the left. J.P. testified Walker fired shots from the front passenger seat, and they drove off. According to J.P., the shots were "just [aimed in] the direction of the car." He did not know until later

² J.P., 17 years old at the time of the incident, was charged as a minor and admitted to a charge of accomplice after the fact in connection with the crime.

³ J.P. testified there was also a female in the car, but he could not recall her name.

anyone had been injured, when he learned Crystal had been killed. He knew Crystal because they went to high school together.

Curtis testified that the car with Walker in it "rolled around us and started shooting us, into the car." The following exchange occurred:

"Q: Did you see who was doing the shooting?

"[Curtis]: Yes, the back seat.

"Q: Who was it?

"[Curtis]: I believe it was Walker."

Curtis heard three shots. He testified Crystal leaned toward him in the passenger seat, losing control of the vehicle. Curtis grabbed the steering wheel, slid Crystal's foot off the accelerator and steered up a hill to stop the car. Curtis saw "a lot of blood coming out her neck, squirting up." He pulled Crystal over to the passenger seat, got out of the car and moved to the driver's side, and drove the car a few blocks to Crystal's mother's house, where he called an ambulance. Curtis carried Crystal into the house while they waited for help to arrive. Crystal was not responsive, and Curtis was not sure if she was still alive, but he thought her heart was still pumping.

Crystal was found dead at her mother's house. An autopsy revealed three gunshot wounds, two of which were lethal. The first was a bullet wound which entered on the left side of Crystal's face, transected certain parts of her brain, and remained lodged. The second tore her jugular vein, severed her spinal cord, and exited her right shoulder. A third, nonlethal bullet wound entered and exited through her neck. The medical examiner

concluded the cause of Crystal's death was gunshot wounds to the head and neck and classified the manner of death as a homicide.

In police interviews after the shooting, Curtis told interviewers the gunshots came from the front passenger seat.⁴ In May 1995, a detective showed Curtis a yearbook from his middle school; Curtis identified Walker as the individual who was sitting in the front passenger seat.

During interviews, detectives tried to determine whether the shooting was gang-related. A detective asked Curtis whether anyone used hand signs to indicate gang affiliations or wore any particular color of clothing. Curtis stated a passenger in the other car was wearing a red shirt. For the detective, this was significant because Blood gangs affiliate with the color red.

Detective Hernandez, a detective with the San Diego Police Department in the street gang unit, testified Skyline Piru was a Blood gang that claimed the community of Skyline, in southeast Encanto, as its territory. Several Blood sets and at least one Crip set lived in that area. The day before Crystal was shot, Detective Hernandez responded to a request for assistance from a high school reporting a disturbance at the school caused by a gray Saab. Detective Hernandez stopped a Saab driven by Sayles. Detective Hernandez completed a field interview report to memorialize the stop; the report stated

⁴ At trial, Curtis acknowledged that he had previously stated, in police interviews, that the shots came from the front passenger seat, but, at the time of his testimony, he believed they came from the rear right passenger seat. He testified he believed it was Walker who was shooting because the shots came from where he saw Walker positioned in the car at the gas station.

that Sayles was driving, Walker was in the front passenger seat, and J.P. was in the back seat. Sayles, Walker, and J.P. each claimed they were Skyline Piru gang members.

Several months after Crystal's death, the gun used to shoot her was located during a traffic stop of a vehicle belonging to C.C. J.P. knew C.C. from the Skyline neighborhood; they grew up together. In addition to finding the gun in C.C.'s car, officers also found a notebook filled with writing the officer associated with Skyline Piru.

Detective Sanchez, a gang investigator with the San Diego Police Department, testified that gang sets, generally, are involved in shootings, stabbings, and robberies.

Detective Hutchinson, a detective assigned to the San Diego Police Department's gang unit from 1988 to 2005, testified as a gang expert. In 1995, he was responsible for investigating the Skyline Piru Bloods, also referred to as the East Side gang. Detective Hutchinson testified that, in 1995, Encanto was considered to be the Skyline East Side Piru area. He testified it could be considered disrespectful if a Crip or someone who identified with the color of blue went into that area. He opined that if the Skyline Pirus did not confront a person they perceived to be a Crip in their neighborhood, they would be perceived as weak and unsupportive of their gang. They would lose street credibility. It was very important for gang members to have credibility and a reputation for being strong within their gang because a gang member does not want to be perceived as "soft," weak, or unable to support the gang.

Detective Hutchinson testified that " 'mad dogging' " was staring at a person in an angry or disrespectful manner. He testified that, if a person perceived to be a Crip went into an area claimed by a Blood set like Skyline, a violent confrontation could follow.

Detective Hutchinson testified that, if a car full of Blood gang members chased a person they perceived to have disrespected them and fired a gun into that person's car, then that crime was committed for the benefit of the Blood gang set—to respond to disrespect and to maintain the status of the gang.

When Detective Hutchinson was asked to define a street gang, he testified, "[B]asically the criteria is it has to be two or more persons. . . . [T]hose persons have to claim a turf or a territory of a city or area. . . . [T]hey have to have a name, and they have to, within those, the group of people be involved in, some type of criminal activity to benefit their gang." Detective Hutchinson explained street gangs use graffiti to mark their territory, described the concept of disrespect in the gang culture, explained how a street gang "claimed" a neighborhood, and described the rivalry between the Crip and Blood gangs.

Detective Hutchinson testified that, as a gang detective, he investigated all gang crimes and activities of the gang members. He testified the majority of crimes were committed against rival gangs, "so it would be the Bloods against the Crips, whether it be shootings, robberies, . . . any criminal activity, usually it's between the rival gang." When asked what type of criminal activity gangs participate in, Detective Hutchinson testified he "investigated crimes up to and including murder, down to battery, theft, . . . robberies, narcotics. Pretty much every crime, they are involved in, that I can think of." When asked if he would consider them mostly violent crimes and drug-related crimes, Detective Hutchinson responded that "[a] lot of the crimes are violent crimes, correct."

Detective Hutchinson testified that, in 2003, a documented Skyline Piru gang member was convicted of first degree burglary and voluntary manslaughter. In addition to these two convictions and based on his investigations of criminal gang activity from 1988 to 1995, Detective Hutchinson testified the Skyline Piru Blood gang had engaged in a pattern of criminal activity.

B. Conviction and Sentencing

The jury found Sayles not guilty of the greater offense of murder, but found him guilty of the lesser-included offense of involuntary manslaughter, in violation of section 192, subdivision (b). The jury found true the allegations that Sayles committed the offense for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)(1) and (2)). The jury also found true the allegation that Sayles was vicariously liable for a principal being armed with a firearm in the commission of the crime (§ 12022, subd. (a)(1)). The jury found Sayles not guilty of the attempted murder charge.

The trial court subsequently dismissed the section 186.22, subdivision (b)(2) allegation because it was erroneously included on the involuntary manslaughter verdict form. The court sentenced Sayles to eight years in state prison, comprised of four years for involuntary manslaughter; three years, consecutive, on the gang enhancement (§ 186.22, subd. (b)(1)); and one additional year, consecutive, on the firearm enhancement (§ 12022, subd. (a)(1)).

On appeal, Sayles challenges only the sentence enhancement imposed under section 186.22, contending there is insufficient evidence to support its application

because there was no evidence the Skyline Piru Blood gang engaged in any statutorily enumerated criminal activity as one of its primary activities.⁵ The Attorney General concedes there is no evidence the Skyline Piru Blood gang engaged in any primary criminal activity, which was required to find the Skyline Piru Bloods to be a " 'criminal street gang,' " and agrees the enhancement accordingly must be stricken. The Attorney General further concedes that the parole revocation restitution fine imposed under section 1202.45 is unauthorized and must be stricken. We accept these concessions, direct modification of the judgment, and affirm the judgment as modified.

DISCUSSION

A. Sentencing Enhancement Under Section 186.22

Sayles challenges the sufficiency of the evidence supporting application of the sentencing enhancement under section 186.22. Specifically, Sayles contends, and the Attorney General concedes, that the prosecutor failed to establish the existence of a criminal street gang because there was no evidence that one of the primary activities of the Skyline Piru Bloods was the commission of one or more of the statutorily enumerated crimes. We agree.

"In considering a challenge to the sufficiency of the evidence to support an enhancement, we review the entire record in the light most favorable to the judgment to

⁵ Sayles also contends there is insufficient evidence he committed the crime for the benefit of, at the direction of, or in association with a criminal street gang. Because we conclude application of the gang enhancement is inappropriate given the lack of evidence the Skyline Piru Blood gang engaged in an enumerated criminal activity as one of its primary activities, we do not reach this contention.

determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding." (*People v. Albillar* (2010) 51 Cal.4th 47, 59-60.)

A criminal street gang is defined as "any ongoing organization, association, or group of three or more persons, whether formal or informal, *having as one of its primary activities the commission of one or more of the criminal acts enumerated in . . . subdivision (e)*, having a common name or common identifying sign or symbol, and whose members individually or collectively engage in, or have engaged, in a pattern of criminal gang activity." (§ 186.22, subdivision (f), italics added.)⁶ "The phrase 'primary activities,' as used in the gang statute, implies that the commission of one or more of the statutorily enumerated crimes is one of the group's 'chief' or 'principal' occupations. (See Webster's Internat. Dict. (2d ed. 1942) p.1963 [defining 'primary'].) That definition would necessarily exclude the occasional commission of those crimes by the group's members." (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 323

⁶ In the years since 1995, when the offense was committed, subdivision (e) of section 186.22 has been amended to enumerate additional criminal acts that would constitute primary criminal activities for purposes of subdivision (f). Details regarding the amendments are not relevant to this appeal.

(*Sengpadychith*.) "Sufficient proof of the gang's primary activities might consist of evidence that the group's members *consistently and repeatedly* have committed criminal activity listed in the gang statute. Also sufficient might be expert testimony, as occurred in [*People v.*] *Gardeley* [(1996)] 14 Cal.4th 605. There, a police gang expert testified that the gang of which defendant *Gardeley* had for nine years been a member was primarily engaged in the sale of narcotics and witness intimidation, both statutorily enumerated felonies. [Citation.] The gang expert based his opinion on conversations he had with *Gardeley* and fellow gang members, and on 'his personal investigations of hundreds of crimes committed by gang members,' together with information from colleagues in his own police department and other law enforcement agencies."

(*Sengpadychith*, at p. 324.)

In this case, the evidence the prosecutor presented to prove the gang enhancement allegation under section 186.22, subdivision (b)(1) consisted primarily of the testimony of various police detectives, as well as J.P., a cohort of Sayles and Walker. Detective Hutchinson, the gang expert, testified generally about the types of criminal activity in which gangs participate and testified he investigated all manner of crimes. He stated the Skyline Piru Blood gang had engaged in a pattern of criminal gang activity, but he did not identify any of the Skyline Piru Blood gang's primary criminal activities.

Detective Hernandez, another gang detective with the San Diego Police Department, and J.P., the cohort of Sayles and Walker, also did not provide testimony to establish the Skyline Piru Blood gang's primary criminal activities. Detective Sanchez, who testified that gang sets, generally, are involved in shootings, stabbings, and

robberies, did not testify as to the primary criminal activities of the Skyline Piru Blood gang.

Detective Hutchinson's testimony regarding the two convictions of a documented Skyline Piru Blood gang member is insufficient. He testified that a member of the Skyline Piru Blood gang was convicted of burglary and voluntary manslaughter, both statutorily enumerated offenses. (Pen. Code, § 186.22, subd. (e)(3) & (11).) Even considering these offenses along with Sayles's current conviction for involuntary manslaughter, this testimony merely establishes the occasional commission of crimes by group members, which is insufficient to constitute "evidence that the group's members *consistently and repeatedly* have committed criminal activity listed in the gang statute." (*Sengpadychith, supra*, 26 Cal.4th at p. 324.)

Because the evidence is insufficient to establish the Skyline Piru Blood gang's primary criminal activities, we conclude the prosecutor failed to prove the Skyline Piru Blood gang is a criminal street gang within the meaning of section 186.22, subdivision (f). We therefore strike the jury's true finding on the gang enhancement under section 186.22, subdivision (b)(1) alleged in connection with count 1.

B. Unauthorized Parole Revocation Restitution Fine

The trial court imposed a \$2,400 restitution fine under section 1202.4 and imposed and stayed an additional \$2,400 parole revocation restitution fine under section 1202.45. The Attorney General concedes the parole revocation restitution fine is unauthorized and must be stricken.

Section 1202.4, which was enacted more than a decade before section 1202.45, mandates imposition of a restitution fine when a person is convicted of a crime, unless the court finds compelling and extraordinary reasons for not doing so and states those reasons on the record. (§ 1202.4, subd. (b).) Section 1202.45 requires imposition of an additional parole revocation restitution fine in the same amount as the section 1202.4 restitution fine if the sentence includes a period of parole. (§ 1202.45, subd. (a).)

Section 1202.45 was enacted in 1995 and did not become effective until August 1995, several months after the crime occurred in April 1995. (Stats. 1995, ch. 313, § 6 (Assem. Bill 817), eff. Aug. 3, 1995.) Imposing the parole revocation fine here therefore violates ex post facto principles. (See *People v. Callejas* (2000) 85 Cal.App.4th 667, 676 ["the ex post facto clause forbids imposing a parole revocation fine on a parolee who committed the underlying crime prior to enactment of the fine"]; U.S. Const., art. I, § 10, cl. 1; Cal. Const., art. I, § 9.) We therefore strike the \$2,400 parole revocation restitution fine imposed under section 1202.45.

DISPOSITION

The judgment is modified to strike the three-year sentence enhancement imposed under section 186.22, subdivision (b)(1) for appellant's conviction for the involuntary manslaughter of Crystal Odom in count 1. The judgment is further modified to strike the \$2,400 parole revocation fine imposed under Penal Code section 1202.45. As modified, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment that accurately reflects the defendant's sentence as modified and to forward a copy of that amended abstract to the Department of Corrections and Rehabilitation.

GUERRERO, J.

WE CONCUR:

McCONNELL, P. J.

IRION, J.